

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	*
	*
V	*
	*
BRIAN FOLKS	* CRIMINAL FILE NO. 16-94

JURY TRIAL  
Tuesday, May 7, 2019  
Burlington, Vermont

BEFORE:

THE HONORABLE WILLIAM K. SESSIONS III  
District Judge

APPEARANCES:

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<b>DEFENDANT'S</b>	<b>DESCRIPTION</b>	<b>IN EVIDENCE</b>
Z55	Audio recording of Detective May interview with Chrissy T.	14

1 TUESDAY, MAY 7, 2019

2 (The following was held in open court without the jury  
3 present at 1:15 p.m.)

4 THE COURT: Okay. The attorneys wanted to  
5 speak with me; is that correct?

6 MR. KAPLAN: Well, Judge, I just had one brief  
7 issue. I was going to call Chrissy to the stand -- we  
8 had subpoenaed her -- or Detective May, who we  
9 subpoenaed, to play a tape of when Detective Mann --  
10 Detective May and Chrissy and one other law enforcement  
11 officer interviewed her in December sometime. And --  
12 but the thing I can't do up front is have them  
13 authenticate it because they haven't listened to it.

14 So, I mean, we got it from the government, so we  
15 have listened to it. So I can either have them listen  
16 to it now before the jury comes in so they can say, yes,  
17 that's the tape, or I can -- the government can just be  
18 gracious and let us introduce it into evidence.

19 THE COURT: Is there a motion for a gracious  
20 response by the government? Okay?

21 MS. SAVNER: We don't object to the  
22 authentication, but, your Honor, this is an audio  
23 recorded interview with one of the government's  
24 witnesses that was available to the defense when that  
25 government witness testified.

1           They now want to introduce her prior out-of-court  
2       statement, and now they seem to want to do it without  
3       even having her on the stand and subject to cross  
4       examination on the statement, because they want to do it  
5       through the agent.

6           So we object to the audio recording being played at  
7       all given that it's hearsay and it's clearly being  
8       offered for its truth. They want to play the whole  
9       interview, and we object to it coming in through Chris  
10      May and not having the witness whose statement it is be  
11      available for cross examination.

12           THE COURT: Okay. So, first of all, was this  
13      set up during Ms. Tatro's cross examination?

14           MR. KAPLAN: No, but she is now our witness,  
15      and I can certainly call her and put her on the stand.  
16      And this tape recording has conversations that are  
17      directly related to things she said when she testified  
18      for the government.

19           MS. SAVNER: Not inconsistent.

20           MR. KAPLAN: Yes. She only has some  
21      inconsistent statements in it, for sure.

22           THE COURT: Well, I am going to let you put  
23      the statement on, but I would call her.

24           MR. KAPLAN: Okay.

25           THE COURT: She is here?

1 MR. KAPLAN: Yes, she is here.

2 THE COURT: Okay. You can call her, put her  
3 on. I don't think it requires authentication.

4 MR. KAPLAN: All right.

5 THE COURT: Just play the tape, and the  
6 government has the opportunity to cross examine.

7 MR. KAPLAN: Okay. And we have an exhibit  
8 number for it?

9 THE COURT: Okay. Then who else do you have?

10 MR. KAPLAN: I am going to call Jennifer  
11 Martin first.

12 THE COURT: Okay. And then --

13 MR. GRADY: Your Honor, if I may, just about  
14 Jennifer Martin. I think that relates to Emily Lasell.  
15 She admitted that she said the statement to Jennifer  
16 Martin, so I am not sure why we have to call Jennifer  
17 Martin.

18 THE COURT: Right, yeah. She did say that. I  
19 mean, I was wondering the same thing, frankly. She  
20 acknowledged that the statement was made.

21 MR. KAPLAN: Well, I asked her if she knew  
22 whether or not Ayla was prostituting, and she said yes,  
23 but she -- I think she said she didn't know how. And  
24 what she told Jennifer was that she was doing it with  
25 her -- that this witness was doing it with -- with --

1 Ayla.

2 THE COURT: Oh, so that's the difference?

3 MR. KAPLAN: That's the significant  
4 difference, I think. It's not left out there that she  
5 sort of heard it or somebody had -- it was common  
6 knowledge the fact that she said to our investigator  
7 that she was doing it with Ayla.

8 THE COURT: All right.

9 MR. GRADY: But that's what counsel asked her  
10 if she said that to Jennifer Martin, and she said, "Yes,  
11 I did," and then she clarified it. I don't have it in  
12 front of me, but not -- you know, she qualified what she  
13 said to Jennifer Martin with what she said in her  
14 testimony.

15 MR. KAPLAN: It's not the same.

16 THE COURT: So -- but if -- I am going to let  
17 you call the -- it's going to be a two-minute witness, I  
18 assume.

19 MR. KAPLAN: Yes.

20 THE COURT: If that -- if that is  
21 inconsistent -- yeah, I suppose it is inconsistent.

22 Okay. And your expert?

23 MR. KAPLAN: Yes. Hopefully he will go on  
24 today at some point.

25 THE COURT: Okay. Right.

1           Okay, so ready for the jury?

2           MR. KAPLAN: Yes, Judge.

3           THE COURT: Okay.

4           (The following was held in open court with the jury  
5           present at 1:24 p.m.)

6           THE COURT: Okay. Mr. Kaplan, you want to  
7           call your next witness.

8           MR. KAPLAN: Your Honor, I would call Jennifer  
9           Martin to the stand.

10                           JENNIFER MARTIN,

11           having been duly sworn by the courtroom deputy,  
12           was examined and testified as follows:

13           THE COURT: Good afternoon, Ms. Martin.

14           THE WITNESS: Hi.

15                           DIRECT EXAMINATION

16           BY MR. KAPLAN:

17           Q     Miss Martin, would you state your full name,  
18           please.

19           A     It's Jennifer Martin.

20           Q     And you live in Chittenden County?

21           A     Yes.

22           Q     And what is your profession?

23           A     I am a private investigator.

24           Q     And were you retained by the defense to work on the  
25           Brian Folks case that we're involved in right now?

1 A Yes.

2 Q And as part of your responsibilities, were you  
3 asked to meet with Emily Lasell?

4 A Yes.

5 Q And did you meet with her?

6 A I did.

7 Q And you served her a subpoena?

8 A I did.

9 Q And did you memorialize your conversation in a --  
10 in a report?

11 A I did.

12 Q Let me show you what's been marked as Defendant's  
13 Exhibit Z56 and ask you if that's the report?

14 A That is my report.

15 Q Where was it that you had this conversation with  
16 her?

17 A At Emily's workplace in Colchester.

18 Q And she told you that she knew that Ayla was  
19 prostituting before she met Brian?

20 A Yes, she told me that.

21 Q And did you ask her how she knew?

22 A Yes.

23 Q And what did she say?

24 A She said she knew because she was doing it with  
25 Ayla.



1 Q And this was before she met Brian?

2 A And she clarified that it was before she met Brian,  
3 before 2015.

4 MR. KAPLAN: I have nothing further.

5 THE COURT: Okay. Any questions from the  
6 government?

7 MR. GRADY: No, your Honor.

8 THE COURT: Okay. Thank you, Miss Martin.

9 THE WITNESS: Thank you.

10 (Witness excused.)

11 THE COURT: All right. The government call  
12 the next witness.

13 MR. KAPLAN: Your Honor, I would call Chrissy  
14 to the stand.

15 THE COURT: Is that Chrissy Tatro?

16 MR. KAPLAN: Yes.

17 CHRISSY T.,

18 having been duly sworn by the courtroom deputy,  
19 was examined and testified as follows:

20 THE COURT: Good afternoon, Miss Tatro.

21 THE WITNESS: Good afternoon, Judge.

22 DIRECT EXAMINATION

23 BY MR. KAPLAN:

24 Q Would you state your full name, please.

25 A Chrissy Tatro.

1 Q And you were just out sitting with Detective May?

2 A Yes.

3 Q And you heard the conversation about you and  
4 Detective May having a conversation in his car?

5 A I believe so, yes.

6 Q And you remember that conversation?

7 A No.

8 Q Okay. So I'm going to play defense Exhibit Z55 for  
9 you and see if you -- if this refreshes your memory.  
10 Okay?

11 A Okay.

12 THE COURT: All right. So actually, are you  
13 broadcasting this --

14 MR. KAPLAN: We may have to do it outside the  
15 presence of the jury if it's just to refresh her memory.  
16 I wasn't going to play it so everyone could hear it.

17 THE COURT: I thought you were suggesting that  
18 this was an inconsistent statement, you set up that as  
19 an inconsistent statement. Then you'd play the video.

20 MR. KAPLAN: Well, actually she is our witness  
21 at this point, and I want to play a statement that she  
22 made that's consistent with some of her statements and  
23 inconsistent with others statements that she has  
24 previously done, but I --

25 THE COURT: Oh, all right. So --

1 MR. KAPLAN: I think we can ask her -- play a  
2 tape where she was -- had a conversation with the police  
3 about her involvement in this matter.

4 THE COURT: Okay. So how long is the tape?

5 MR. KAPLAN: 16 minutes.

6 THE COURT: Okay. Does the government have  
7 any objection to just playing the tape and moving along  
8 at that point?

9 MS. SAVNER: The government does not object to  
10 the authentication -- the authenticity of the tape.  
11 However, as stated, the government does object. This is  
12 hearsay. This is this witness's prior out-of-court  
13 statements being offered for their truth, and they are  
14 identifying specific things that they are using to  
15 impeach her prior testimony.

16 THE COURT: Okay. Would counsel approach the  
17 bench.

18 (The following was held at the bench.)

19 THE COURT: Okay. Let me just make sure I  
20 understand exactly the purpose. I thought you were  
21 calling her to testify that she had made statements  
22 perhaps inconsistent with what she said.

23 MR. KAPLAN: She definitely -- there are  
24 definite misstatements on that disk that we do --

25 THE COURT: Okay. And that's to impeach her

1 credibility --

2 MR. KAPLAN: Yeah. Just not --

3 THE COURT: -- when she testified for the  
4 government.

5 MR. KAPLAN: Yes.

6 THE COURT: Right? So you certainly can  
7 introduce those statements.

8 MR. KAPLAN: But I want to play the tape,  
9 because she says -- for example, she says that she is  
10 not afraid of our client and all of that, he would never  
11 hurt her, and she said the opposite when she was  
12 testifying. And there's other statements she made about  
13 her relationship to people, and since she is my witness,  
14 I think I ought to be able to play a --

15 THE COURT: Well, those are inconsistent  
16 statements.

17 MR. KAPLAN: Yeah, I --

18 THE COURT: Those are a series of inconsistent  
19 statements, right? You're --

20 MR. KAPLAN: Maybe not everything's an  
21 inconsistent statement, but --

22 THE COURT: Well, then I would think the  
23 government would want to introduce, I suppose, things  
24 which are --

25 MR. KAPLAN: I suppose -- that's fine.

1 THE COURT: So then my simple question is, if  
2 you can put in the inconsistent statements by way of the  
3 tape -- right? That's what you want to do?

4 MR. KAPLAN: Yes.

5 THE COURT: And the government would want to  
6 say -- introduce consistent statements consistent with  
7 her truth in response to your introducing  
8 conflicting statements --

9 MR. KAPLAN: That's fine.

10 THE COURT: -- why don't we just play the  
11 tape?

12 MS. SAVNER: And the government will have the  
13 opportunity to cross examine her?

14 THE COURT: Oh, afterwards. Absolutely.  
15 Okay?

16 MR. KAPLAN: Okay. Thank you, Judge.

17 THE COURT: I think that's logically the way  
18 the evidence rules work. Okay.

19 (The following was held in open court.)

20 THE COURT: So you are proposing to play the  
21 tape; is that correct?

22 MR. KAPLAN: Yes.

23 THE COURT: And do you have it marked?

24 MR. KAPLAN: I do. It's marked as Defendant's  
25 Exhibit Z55.

1 THE COURT: Okay. I am going to admit that  
2 tape, the simplest way of addressing both parties'  
3 concerns, and then you can play the tape and then the  
4 government has the opportunity to cross examine.

5 MR. KAPLAN: Thank you, Judge.

6 THE COURT: Okay.

7 (Defendant's Exhibit Z55 was received in  
8 evidence.)

9 MS. SAVNER: Your Honor, we have it. We can  
10 play it.

11 THE COURT: So no objection. All right. And  
12 I bet you have a running commentary underneath? Do you?

13 MS. SAVNER: We actually do not have that, no.

14 THE COURT: Oh, you don't?

15 MS. SAVNER: No.

16 THE COURT: Oh, all right. Okay.

17 So is the government -- the government can play the  
18 tape.

19 MR. KAPLAN: Thank you, Judge.

20 (A digital recording was played in open  
21 court.)

22 BY MR. KAPLAN:

23 Q So in that conversation, you are talking with two  
24 police officers, right?

25 A Yes.

1 Q And you are speaking with two police officers who  
2 you were working for?

3 A Yes.

4 Q And they were paying you for your work?

5 A Yes.

6 Q And you had an interest of being honest with them,  
7 right?

8 A Yes.

9 Q And you told them that Brian never used force. You  
10 never saw him hit anyone. Didn't you say that?

11 A I must -- I said it on the tape, yes.

12 Q And you said that -- that you were not afraid of  
13 Brian?

14 A Yes.

15 Q And, again, as you just testified, these were --  
16 these were police officers who you wanted to be on their  
17 good side. They were paying, you right?

18 A Yes.

19 Q And you had an interest in being honest with them?

20 A Yes.

21 Q And you also said that if some of the young girls  
22 were sick because they needed drugs, Brian would give  
23 them drugs so they would no longer be sick?

24 A Yeah.

25 THE COURT: I'm sorry, no longer what?

1 MR. KAPLAN: Be sick.

2 THE COURT: Okay.

3 BY MR. KAPLAN:

4 Q And is it fair to say that you said all these  
5 things to the police officers before you prepared your  
6 testimony for trial that you gave the other day?

7 A It was a long time ago.

8 Q Way before you sat down with the prosecutors in  
9 this case and figured out what you were going to say at  
10 trial?

11 A Yes. It was a long time ago.

12 MR. KAPLAN: Could I have a moment, Judge?

13 THE COURT: Yes.

14 (Brief pause.)

15 MR. KAPLAN: I don't have anything further,  
16 Judge. Thank you.

17 THE COURT: Okay, cross examination?

18 MS. SAVNER: Yes, your Honor. May I have one  
19 moment?

20 THE COURT: Yes.

21 MS. SAVNER: Thank you.

22 (Brief pause.)

23 CROSS EXAMINATION

24 BY MS. SAVNER:

25 Q Hi Chrissy.



1 A Hi.

2 Q Sorry you have to be here again.

3 A Yes.

4 Q I just want to ask you a few questions about what  
5 we heard.

6 A Okay.

7 Q So a lot of what you said in there is -- same as  
8 what you said last week on the stand, right?

9 A Yes.

10 Q Okay. So in that interview with Chris May,  
11 Detective May, you said that the girls posted  
12 themselves, right?

13 A Yes.

14 Q And that's what you saw. Sometimes the girls would  
15 post their ads on their own?

16 A Correct.

17 Q And Folks oversaw the ads, right?

18 A Yes.

19 Q He -- you saw the girls go to him and ask him for  
20 his approval --

21 A Yes.

22 Q -- on pictures?

23 A Yes.

24 Q How many times did you see that?

25 A A lot.

1 Q Okay. And that's why Folks paid for their cell  
2 phones, right?

3 A Correct.

4 Q So they could post?

5 A Correct.

6 Q He didn't like to dirty up his own phone, right?

7 A Right.

8 Q He didn't want criminal stuff on his own phone?

9 A Correct.

10 Q And they used the phones that he provided the money  
11 for to post Backpage ads, correct?

12 A Correct.

13 Q And they used those phones to get the prostitution  
14 dates, right?

15 A Correct.

16 Q And you said you knew that -- in that interview  
17 that V and Ayla were working for him?

18 A Yes.

19 Q You also testified that Amanda S., Ashley P., Red  
20 and Jerricka, all these people were working for him?

21 A Correct.

22 Q And we talked about this last week. If the girls  
23 didn't have phones, then they couldn't post, right?

24 A Correct.

25 Q And Folks knew that?

1 A Right.

2 Q And if they couldn't post, they couldn't make any  
3 money?

4 A Correct.

5 Q You said in that interview with Chris May that  
6 they -- they paid -- the girls paid Folks for overhead,  
7 right?

8 A Yes.

9 Q So that included hotels? Is that a yes?

10 A Yes. Sorry.

11 Q That's okay. Transportation?

12 A Correct.

13 Q Condoms?

14 A Correct.

15 Q And the phones?

16 A Correct.

17 Q They paid him certain amount of their earnings,  
18 right?

19 A Correct.

20 Q And with their part of their earnings, they'd buy  
21 drugs from him, right?

22 A Correct.

23 Q And it was a big no-no to buy drugs from anyone  
24 else, right?

25 A Correct.

1 Q You said in that interview that there would be  
2 trouble if they tried to buy drugs from someone else?

3 A Correct.

4 Q And you testified last week about what happened  
5 when Red, one of the women who had been prostituting for  
6 Folks, went over to that rival drug dealer, Black,  
7 right?

8 A Correct.

9 Q Folks got really upset about that?

10 A Right.

11 Q He went up to the North Ave. house and got some  
12 guns for him and Hightower?

13 A Correct.

14 Q So you knew that the women who were prostituting  
15 for Folks would get in trouble if they bought drugs from  
16 other people?

17 A Correct.

18 Q That was obvious?

19 A Yes.

20 Q And all of these girls were severely heroin  
21 addicted, right?

22 A Yes.

23 Q And they were buying their drugs from him with  
24 their portion of their earnings?

25 A Correct.

1 Q Earnings from prostitution?

2 A Yes.

3 Q And you testified last week and you said in this  
4 interview that we just heard that sometimes he'd give  
5 them a little something to get them well just so they  
6 could go on the dates, right?

7 A Correct.

8 Q But sometimes he even had you do that, right?

9 A Correct.

10 Q But then they were expected to come back and pay  
11 him with their earnings?

12 A Correct.

13 Q And buy drugs from him with their earnings?

14 A Correct.

15 Q And if they didn't pay him back, there would be  
16 more trouble, right?

17 A Correct.

18 Q Let's talk about Ayla. You said in that interview  
19 that Folks actually felt bad because he was the one that  
20 got her into prostitution in the first place?

21 A Yes.

22 Q And you said in that interview that you can't  
23 believe Ayla. You knew Ayla when she was heavily using  
24 heroin, right?

25 A Correct.

1 Q And at that time, she was lying and stealing to get  
2 by?

3 A Correct.

4 Q She stole from you, as you testified about?

5 A Correct.

6 Q And you haven't spent significant time with her in  
7 the last year or so?

8 A No.

9 Q Since you left Lori's house in November before  
10 2015?

11 A Correct.

12 Q And when you left, she was still there working out  
13 of Lori's, right?

14 A Correct.

15 Q Prostituting for Folks?

16 A Correct.

17 Q You said in this audio recording that you weren't  
18 scared of him anymore. Did you used to be scared of  
19 him?

20 A Yes.

21 Q And when you said that, you were in a car with two  
22 law enforcement agents, right?

23 A Correct.

24 Q That you weren't scared of him anymore?

25 A Yes.

1 Q Were you, in fact, scared of him, as you testified,  
2 on January 12th when he showed up at the Cottage Grove  
3 house and you realized he was there?

4 A Correct.

5 Q You texted Chris May, "Moe is here. I'm scared.  
6 OMG," or something like that, right?

7 A Yes.

8 Q You told the interviewers in the interview we just  
9 heard that you never saw him hit any of the girls. And  
10 that's consistent with what you testified last week,  
11 right?

12 A Correct.

13 Q And you just started working with Moe in mid 2015,  
14 right?

15 A Yes.

16 Q So you didn't see anything that happened with him  
17 before that, right?

18 A No.

19 Q Okay. And let's talk about what you did see when  
20 you were at Lori's house working with Moe, because --  
21 you don't know what the legal definition of force is,  
22 right? Or threats of force?

23 A No.

24 Q Okay. So let's talk about what you did see. You  
25 did see him being physically intimidating, right?

1 A Yes.

2 Q Most of these women who worked for him were small  
3 and thin?

4 A Yes.

5 Q He towered over them?

6 A Yes.

7 Q He would step up to them and get in their face?

8 A Yes.

9 Q You saw him with guns?

10 A Yes.

11 Q You knew he kept a stash of guns at the North Ave.  
12 house?

13 A Yes.

14 Q And you mentioned in that recording we just heard a  
15 machine gun too?

16 A Yes, I believe so. Yes.

17 Q You saw him put a bounty out for Keisha when she  
18 stole from you?

19 A Yes.

20 Q And you don't know what happened to Keisha after  
21 that?

22 A No.

23 Q He did things that were humiliating to you, right?

24 A Yes.

25 Q And humiliating to the other women?



1 A Yes.

2 Q Sometimes he filmed those things?

3 A Yes.

4 Q He kicked girls out when they made him mad?

5 A Yes.

6 Q Did they have anywhere else to go?

7 A No.

8 Q He took their phones back?

9 A Yes.

10 Q And, Chrissy, you said you didn't see him hit any  
11 of the other girls, but he put his hands on you, right?

12 A Yes.

13 Q Okay. There was an incident with Folks that you  
14 have never wanted to talk about, right?

15 A Yes.

16 Q And I have asked you about it a few times and you  
17 have never wanted to say.

18 A Correct.

19 Q Can you tell us now what happened?

20 A No.

21 Q Am I correct that he tried to have sex with you?

22 A Yes.

23 Q Am I correct that you didn't want him to?

24 A Can we -- yes. Can we --

25 Q Just --

1 A Yes. Can we please --

2 Q Just a few more questions.

3 He kept going even though you didn't want him to.

4 A Yes.

5 Q You ended up with bruises?

6 A Yes.

7 Q Who was there when this happened?

8 A No one.

9 Q Did you tell any of the girls in the house about  
10 it?

11 A No.

12 Q So is it possible that he took other girls alone  
13 and hurt them and you didn't know about it?

14 A Yes.

15 MS. SAVNER: Nothing further.

16 THE COURT: Okay. Any redirect?

17 MR. KAPLAN: Just a minute, Judge.

18 (Brief pause.)

19 THE WITNESS: I can't take it anymore. I'm  
20 done. I'm done. I'm done here.

21 MS. SAVNER: Your Honor, can we -- I think the  
22 witness needs a break.

23 THE COURT: Yes. Do you --

24 MS. SAVNER: Maybe if we can inquire of  
25 Mr. Kaplan is he is going to have anything?

1 MR. KAPLAN: I do have some questions.

2 THE WITNESS: I can't.

3 THE COURT: Okay. Let's -- let's just take a  
4 five-minute break. Okay. And the jury can go back in  
5 the jury room.

6 (Court was in recess at 2:01 p.m.)

7 (The following was held in open court with the jury  
8 present at 2:11 p.m.)

9 THE COURT: Okay. Mr. Kaplan?

10 REDIRECT EXAMINATION

11 BY MR. KAPLAN:

12 Q Do you remember on the tape when the police  
13 officers asked you who was prostituting, you said there  
14 were two, Ayla and V?

15 A Yes. Among others.

16 Q But you said there were two, Ayla and V, and then  
17 you said the others were acting somewhat independently.  
18 Do you recall that?

19 A Yes.

20 Q Okay. And do you recall when you testified last  
21 time you gave some context to why you were nervous when  
22 you saw Brian at Unc's house, because you had stolen  
23 drugs from him, right?

24 A Yes.

25 Q And he had asked you to leave?

1 A Yes.

2 Q And then you recall saying that you kept e-mailing  
3 him or texting him telling him you wanted to come back,  
4 that you were sorry?

5 A Because I felt wanted or needed. Yes.

6 Q And you weren't so afraid of Brian at that point  
7 that -- that you didn't want to come back and work with  
8 him?

9 A Yes.

10 Q And wasn't that around the same time that you had  
11 this conversation with the police, or this -- the  
12 conversation a little bit after that?

13 A I don't recall.

14 Q But it was after that?

15 A I don't recall.

16 Q Okay. You don't recall being in the police car --

17 A I do, but -- yes.

18 MR. KAPLAN: Okay. I have nothing further,  
19 your Honor.

20 THE COURT: Okay. Anything further from the  
21 government?

22 MS. SAVNER: Very briefly, your Honor.

23 THE COURT: Yes. Okay.

24 RECROSS EXAMINATION

25 BY MS. SAVNER:

1 Q Miss Tatro, do you remember giving a written  
2 statement when you signed up to work with Essex?

3 A Yes.

4 Q And that was back in November of 2015?

5 A Yes.

6 Q And you said in that statement, "Recently one of  
7 the guys tried to have sex with me. I said no, and got  
8 out of there when" --

9 MR. KAPLAN: Objection, your Honor. This goes  
10 beyond the scope of --

11 THE COURT: Isn't that beyond the scope of  
12 cross examination?

13 MS. SAVNER: It's a prior consistent  
14 statement. He has just attacked -- it's a prior  
15 consistent statement.

16 THE COURT: About a sexual assault?

17 MS. SAVNER: Well, I --

18 THE COURT: I don't think that was raised in  
19 the cross examination.

20 MS. SAVNER: The defense counsel --

21 MR. KAPLAN: May we approach, Judge? If we  
22 are to discuss this, I think we should --

23 THE COURT: Okay. All right.

24 (The following was held at the bench.)

25 MR. KAPLAN: I don't know why I asked to

1 approach because I didn't know what was going to be said  
2 next, but --

3 THE COURT: What do you want to ask?

4 MR. KAPLAN: I don't want to ask anything. I  
5 don't want her to ask anything either.

6 THE COURT: Well, okay. So the reason that I  
7 was about ready to sustain the objection is I didn't  
8 think that he went in at all into the sexually --

9 MS. SAVNER: Well, he went into the basis for  
10 her fear.

11 MR. KAPLAN: Well, she testified that she  
12 stole drugs.

13 THE COURT: Well, but there's still an issue  
14 of timing. I just don't think we want to go down that  
15 route again.

16 MS. SAVNER: Okay.

17 THE COURT: So you made your point.

18 MS. SAVNER: Okay.

19 THE COURT: All right.

20 (The following was held in open court.)

21 MS. SAVNER: Chrissy, I don't have any more  
22 questions for you. You can go.

23 THE WITNESS: Thank you.

24 THE COURT: Okay.

25 (Witness excused.)

1 THE COURT: Okay. The defense have the next  
2 witness?

3 MS. SEN: Yes, your Honor. We call Anthony  
4 Martino.

5 THE COURT: Okay.

6 ANTHONY MARTINO,  
7 having been duly sworn by the courtroom deputy,  
8 was examined and testified as follows:

9 THE COURT: Good afternoon.

10 THE WITNESS: Good afternoon, your Honor.

11 DIRECT EXAMINATION

12 BY MS. SEN:

13 Q Could you please state your name and spell it for  
14 the record.

15 A My name is Anthony, A-N-T-H-O-N-Y, Martino,  
16 M-A-R-T-I-N-O.

17 Q Can you describe your formal educational  
18 background, where you went to school.

19 A I have a bachelor's degree from the State  
20 University of New York at Geneseo, and I have a master's  
21 degree in economic crime management from Utica College.

22 Q What did you do after college?

23 A After college, I joined the Utica Police Department  
24 in the City of Utica, New York.

25 Q And what were your duties during your time in the

1 Utica Police Department?

2 A In the early part of my career, I went through a  
3 large myriad of typical police duties including routine  
4 patrol, et cetera, street-level policing. About four  
5 years into my career I became a member of the crime  
6 scene unit. I spent nearly four years doing crime scene  
7 investigation and evidence collection. I was promoted  
8 to the rank of sergeant in my seventh year on the  
9 department, and then I became the supervisor of the  
10 management information systems unit, which was in charge  
11 of all of the IT assets of the department. I was also  
12 in charge of the computer crime unit and started and  
13 then was the director of the department's computer  
14 forensics laboratory.

15 Q So what kind of training did you receive with  
16 respect to digital forensics?

17 A I have received extensive training in digital  
18 forensics. I have received training in basic,  
19 intermediate and advanced computer forensics by the  
20 National White Collar Crime Center.

21 I have received training in intermediate forensics  
22 from Guidance Software, which is the maker of forensic  
23 software called EnCase.

24 I received training in basic computer forensics as  
25 well as two separate courses in advanced computer



1 forensics for Microsoft Windows systems from Access  
2 Data, Incorporated, which is the maker of another large  
3 forensics software package.

4 I have received training specifically in the  
5 forensic examination of cellular telephones from a  
6 company called BK Forensics and also a company called  
7 Paraben Forensics, both who make products designed to  
8 forensically examine cellular telephones. And I have  
9 also been trained by the United States Secret Service  
10 both in basic and advanced computer forensics.

11 Q Do you have any specialized training in  
12 investigating the use of the internet in crimes against  
13 children?

14 A Yes, I do.

15 Q Can you describe it a little bit for the jury,  
16 please.

17 A I was actually one of the officers who was part of  
18 the initial Internet Crimes Against Children Task Force  
19 in Upstate New York. As part of that task force, I  
20 received training on multiple occasions from the  
21 Internet Crimes Against Children National Task Force  
22 specifically in conducting investigations on the  
23 internet, investigations primarily aimed at  
24 investigating the exploitation of children. And I also  
25 received training in conducting undercover operations

1 online.

2 Q Can you just give a brief definition, down to  
3 earth, of what digital forensics is?

4 A Sure.

5 Digital forensics is the examination of items that  
6 contain digital data, traditionally things we think of  
7 such as user -- commercial, consumer items: computers,  
8 like laptops and desktops, cellular telephones, external  
9 media like thumb drives and CDs, but it can also be some  
10 nontraditional devices such as gaming systems like  
11 Xboxes and PlayStations, hand-held gaming systems, et  
12 cetera.

13 The forensics part of this discipline is applying  
14 scientific principles and procedures to the examination  
15 of those devices in order to identify and extract  
16 information of interest to an investigation.

17 One of the key tenets of digital forensics is that  
18 the -- that process of examining, identifying and  
19 extracting happens in a manner that is both forensically  
20 sound, meaning that the integrity of that process can be  
21 proven, and then it's also conducted in a manner that's  
22 repeatable so that another digital forensics examiner  
23 should be able to examine the same media, the same  
24 device, and arrive at the same conclusions.

25 Q Approximately how many digital forensic

1 examinations did you do while you were at the Utica  
2 Police Department?

3 A Hundreds.

4 THE COURT: I'm sorry, I couldn't quite hear  
5 you.

6 BY MS. SEN:

7 Q Approximately how many digital forensic  
8 examinations did you conduct while you were at the Utica  
9 Police Department?

10 A Hundreds. By the time I retired, I was conducting  
11 nearly a hundred examinations a year.

12 Q And during this time you mentioned that you got  
13 some training from the Secret Service. Did you have any  
14 special position?

15 A I did. For nine years I was a deputized member of  
16 the United States Secret Service Electronic Crime Task  
17 Force.

18 Q And as part of that task force, what did you do?

19 A I performed computer crime investigations and  
20 computer forensic examinations in support of the Secret  
21 Service's mission.

22 Q And in addition, while you were on the police  
23 force, did you also begin teaching?

24 A I did.

25 Q Could you describe what kind of teaching you did.

1 A Yes.

2 I've developed and taught courses in cyber security  
3 and computer forensics both at the bachelor's and  
4 master's degree levels.

5 Q And where did you do that?

6 A At Utica College in Utica, New York.

7 Q Now, at some point did you retire from the police  
8 department?

9 A Yes, I did.

10 Q What did you do next?

11 A When I retired from the police department, I took a  
12 full-time position at Utica College. I am still in that  
13 position. I am the director of the college's Northeast  
14 Cyber Security and Forensic Center. The center at the  
15 college is designed to operate a computer forensics  
16 laboratory environment that allows for not only the  
17 examination of digital evidence but also research and  
18 development related to computer forensics in a manner  
19 that assists both the academic environment but also  
20 private and government sectors as well.

21 Q Do you have a top-level government security  
22 clearance?

23 A Yes. I currently hold a top secret government  
24 clearance.

25 Q And is that connected to your work in digital

1 forensics?

2 A That's actually connected to -- in addition to  
3 working at the Northeast Cyber Security and Forensics  
4 Center, I am a founder and current partner in a private  
5 cyber security firm, and our firm has government  
6 contracts specifically with the United States Air Force,  
7 so that clearance is related to that work.

8 Q Have you ever testified in a case before?

9 A Yes, I have.

10 Q How many times have you been qualified as an expert  
11 in digital forensics?

12 A I would say at least a half a dozen, maybe a few  
13 more.

14 Q And have you testified in both federal and state  
15 court?

16 A Yes, I have.

17 Q And have you been qualified as an expert in the  
18 federal court?

19 A Yes, I have.

20 MS. SEN: Your Honor, I would offer Mr.  
21 Martino as an expert qualified in the area of digital  
22 forensics, both computers and cell phones.

23 THE COURT: Okay. Anyone --

24 MR. GRADY: No objection, your Honor.

25 THE COURT: Okay. So qualified.

1 BY MS. SEN:

2 Q Could you please walk the jury through what happens  
3 from the time that a computer is seized until it's  
4 examined?

5 A So as I testified, one of the key tenets of  
6 computer forensics is to ensure the integrity of the  
7 examination process, and that truly begins prior to its  
8 arrival in a laboratory environment.

9 Like any evidence, digital evidence has the  
10 opportunity to become damaged, corrupted, et cetera. So  
11 it's actually very fragile, although the devices  
12 themselves are not. The evidence contained within them  
13 can be extremely fragile. So from the time that a  
14 device is seized, the expectation is that, number one,  
15 that device be protected in a manner which will ensure  
16 that the data on that device remains in its state.

17 So as a couple examples of external influences,  
18 computers and water don't get along. So certainly we  
19 would expect that when a device is seized, whether it be  
20 a cell phone or a computer, et cetera, it be kept clean,  
21 dry.

22 A number of different media that data can be stored  
23 on, including our traditional hard drives, are magnetic,  
24 so there are actually steps that have to be taken to  
25 ensure that those media stay away from strong magnetic

1 fields, because it could actually destroy the data.

2 The key component of preserving digital evidence  
3 up -- from seizure until examination is really the same  
4 as physical evidence, is that there's a solid chain of  
5 custody that can describe the exact movements and  
6 handling of a piece of evidence at every moment and at  
7 every transfer or transition of it and steps in place to  
8 ensure that the data on those devices, when they are  
9 seized, remains intact, uncorrupted and unaltered until  
10 the device can be examined.

11 Q So when you receive a piece of digital -- a digital  
12 device to examine, what are some of the first things  
13 that you look for?

14 A One of the first things we look for is to ensure  
15 that the device is intact and in the same manner that it  
16 was seized. Small devices commonly that are submitted  
17 to our laboratory via law enforcement agencies come in  
18 evidence bags. So they're sealed bags. Seals are  
19 initialed by seizing officers. So when we receive  
20 evidence in that manner, we expect it to be sealed and  
21 initialed properly. If those seals are broken for any  
22 reason, we would make note of that in our report.

23 Larger items that don't regularly fit into an  
24 evidence bag, like a computer tower or gaming systems,  
25 et cetera, we expect to at least be properly labeled so

1       that we can identify the device.

2               It's also common in some law enforcement agencies  
3       with the larger devices that they will seal certain  
4       portions of the device with evidence tape since the  
5       entire device won't fit in a normal evidence bag. So it  
6       is common that we will receive, for instance, a computer  
7       tower with evidence tape over the power, where the power  
8       plug would plug in, and over -- sometimes over the power  
9       button, and that evidence tape would be initialed so  
10      that when those security mechanisms are in place, one of  
11      the first things we do is check that they are intact and  
12      there's no sign of damage or tampering to the device  
13      before we received it.

14      Q     So if you determined that a computer has been  
15      powered on after it was seized by law enforcement before  
16      you receive it, what do you do?

17      A     If that's determined during an investigation, we  
18      will stop our forensic examination at that point.  
19      Notifications would be made to the case agent or the  
20      case agency that submitted that piece of evidence. This  
21      tends to be a bigger issue in criminal cases. It's a  
22      little more uncommon in private cases that don't involve  
23      litigation.

24             In a criminal case, we would also notify the  
25      prosecutor or the defense, depending on who submitted it



1 to our laboratory, because we do do work for both  
2 prosecution and defense, and then wait for direction on  
3 whether or not our examination should continue.

4 We will, though, make notice to whoever submitted  
5 the evidence that at that point we can only attest to  
6 the integrity of the data that's present on any -- on  
7 that particular device from the time it came into our  
8 possession, and we cannot make statements or testify  
9 about it prior to that point.

10 Q Why not? What are the implications of a device  
11 being powered on before you receive it?

12 A The implication, as with pretty much any computer  
13 device, modern computer device, powering on that device  
14 necessarily causes changes to the memory of that device.  
15 So in the case of a computer, it necessarily causes  
16 irreversible changes to the hard drive; in the case of a  
17 cellular telephone, irreversible changes to the memory  
18 present in the cell phone. And we cannot forensically  
19 undo those changes. So we cannot testify in any way as  
20 to the state of that device prior to us receiving it.

21 With computers, in particular, the challenge is in  
22 the way that computers save data and then -- and then  
23 delete data. There's been testimony in this case about  
24 unallocated space, which is the area of -- on the  
25 computer, for instance, the area of the hard drive where

1 files that have been deleted reside.

2 The example I have used before is think of it as an  
3 apartment building. If one of the tenants in one  
4 apartment is moving out, you are going to put that  
5 apartment up for rent, and you may allow that tenant to  
6 stay until the new tenant arrives. But before that, you  
7 put a "for rent" sign on the door so everyone knows that  
8 apartment is available. It's kind of how computers save  
9 data.

10 When either a user or the system deletes a file,  
11 which both happen regularly, the area that file occupies  
12 on the hard drive has marked it as available for rent,  
13 essentially. That data does not immediately disappear  
14 from the hard drive. The user may no longer be able to  
15 see it, but it's still there. And one of the key  
16 functions and capabilities of computer forensics is the  
17 ability to read and analyze that data. It is often, in  
18 many cases, critically important to understand the files  
19 that the person operating the device deleted but also to  
20 be able to examine the files that the device itself  
21 deleted.

22 So in your question, if a computer is powered on  
23 and changes are being made, the system will, all on its  
24 own, create new files as part of its process of powering  
25 on that computer. Those -- and it will also modify

1 files as that process.

2 All of that has to go somewhere, and the place it  
3 goes, in the case of a computer, is the unallocated  
4 space. And it is now taking over space that was  
5 previously occupied by other data. From a forensic  
6 standpoint, we can't peel those layers back and tell you  
7 what used to be there. We can just tell you what's  
8 there now.

9 So one of the key pillars of forensic integrity of  
10 computers or any electronic device is that we don't want  
11 that device powered on, and from a forensic standpoint,  
12 we want to be able to control the access to data on that  
13 computer or that device at all times.

14 Q So once you have a computer and you begin examining  
15 it, what exactly do you do?

16 A So the examination of a computer would begin with  
17 the removal of the hard drive from the computer where  
18 possible. A lot of modern computers don't have  
19 traditional hard drives, so there are other steps for  
20 those, but where possible, the hard drive is removed.

21 The hard drive is then connected to a device called  
22 a forensic write blocker. That device is like a one-way  
23 valve. It allows data to be read but does not allow  
24 data to be written, deleted or in any other way changed  
25 in any form.

1           Once the hard drive is connected to that device, a  
2       complete what we call bit copy is made, otherwise known  
3       as a forensic image. And what that means is the data  
4       stored on a hard drive -- a thumb drive, a CD, or any  
5       other electronic media -- is really just ones and zeros.  
6       At its heart, all computing devices are binary. They  
7       can only work in ones and zeros. So that forensic image  
8       of that hard drive or that bit copy is a copy of every  
9       single one and zero from the evidence in its exact  
10      position, in its exact state, all the way from the very  
11      beginning to the very end with no alteration whatsoever.

12           That is step one, is to create that forensic image,  
13      because all further examination will happen on that  
14      forensic image, not on the original device.

15      Q     Is there a particular way of documenting what you  
16      are examining as you are doing it?

17      A     There's -- there's several ways of examine -- of  
18      documenting items of interest or items of evidence  
19      during a forensic examination. One of the most -- most  
20      of the common forensic software packages provide  
21      mechanisms for either tagging or bookmarking items of  
22      interest and then later a mechanism for combining all of  
23      those tags or all of those bookmarks into an outputtable  
24      report.

25           Certainly many times there are handwritten notes

1       that go along with that process and then eventually get  
2       compiled into a final report of findings.

3       Q     Is there a difference between conducting a forensic  
4       examination of a cell phone and a forensic examination  
5       of a computer?

6       A     Yes. They're actually dramatically different.

7       Q     Can you just briefly sort of describe what the  
8       differences are?

9       A     Although as users we think of cell phones as just  
10      little tiny computers because we can do the same  
11      things -- we can browse the internet, we can send and  
12      receive an e-mail, it feels a lot like the computer  
13      feels -- they do not operate the same way at their core.

14            The way they store data is different. The format  
15      the data's stored in is radically different, and the way  
16      we can examine them is different. So back to my  
17      testimony a few minutes ago:

18            On the computer, we talked about removing the hard  
19      drive and write protecting that hard drive so you could  
20      read data from it and would be prevented from moving any  
21      data into it. With cell phones, we don't have that  
22      capability. There is no removable hard drive in a cell  
23      phone. Memory in a cell phone is stored on chips that  
24      are soldered to circuit boards. Removing those are --  
25      is extremely difficult, takes very specialized tools,

1       very specialized training, and presents great risks to  
2       the integrity of the data.

3               So the tools we use to examine cell phones have to  
4       interact with the cell phone directly. Rather than  
5       the -- the storage being removed from the device, we  
6       interact with the phones in their native environment.  
7       Right off the bat, that requires the phone to be powered  
8       on.

9               So in the computer world, where at all costs we  
10      expect not to have the evidence powered on, in the cell  
11      phone forensics world, traditionally it's -- it's an  
12      expectation and a realization that that phone will need  
13      to be powered on. It's also an expectation and a  
14      realization that changes will be made to that phone  
15      during that process. It's -- we can't avoid that. It's  
16      unavoidable. And it's also an expectation that we  
17      will -- we will insert data into that cellular phone as  
18      part of the forensic process.

19              Whereas in computers, we simply read data out  
20      almost as if we're listening to something without ever  
21      speaking, with cell phones we actually have to make  
22      requests. So by way of forensic software and hardware,  
23      we actually send requests into the cell phone and then  
24      wait for responses to come back.

25              So the examination of those two devices are -- is

1       very different. The mechanisms of ensuring integrity is  
2       very different, and the acceptance of certain risks to  
3       the changing of data is different.

4       Q     Do you ever need to take a cell phone apart in  
5       order to examine it?

6       A     Yes. There are extreme examples of cases where a  
7       device needs to be -- a cellular device needs to be  
8       disassembled in order to read the data from it.

9       Q     You are aware that Mr. Thornton testified about  
10      tearing apart a cell phone here because he couldn't  
11      examine it. Do you think that that was, in your  
12      opinion, based on your experience -- was that something  
13      that was necessary?

14      A     No. From listening to Mr. Thornton's testimony, I  
15      don't agree with that path of action. Mr. Thornton  
16      testified that he was able to power the phone on and see  
17      items that he felt were of evidentiary importance to his  
18      investigation. He was able to use a camera to capture  
19      images of those items.

20            He was asked the question of whether or not there  
21      was additional items on the phone other than what was  
22      captured, and his answer was that he was able to capture  
23      everything that was -- all the user content that was on  
24      the phone, which then indicates to me that there's no  
25      reason to -- to disassemble the phone.

1           The disassembly of the phone, as I mentioned,  
2           requires very significant training and equipment, and  
3           even with the best training and equipment environments,  
4           laboratory environments, still creates a significant  
5           risk of the destruction of data.

6           Q     So in your experience with -- doing online  
7           investigations and internet crime investigations, how  
8           have you -- well, maybe you could describe for the jury,  
9           do you use IP addresses in the course of those  
10          investigations?

11          A     Yes.

12          Q     And maybe you can describe briefly how you use  
13          them.

14          A     Yeah, I think we probably first have to describe  
15          what an IP address is because I don't think there's been  
16          testimony -- at least to my knowledge there has not been  
17          testimony in this case.

18          Q     Sure. So if you could briefly describe what an IP  
19          address is?

20          A     So the term "IP address" is short for -- IP is an  
21          acronym for internet protocol. An IP address is the way  
22          that devices on the internet or any network find each  
23          other. Every -- simplified, every single device that  
24          talks on the internet has to have an IP address. And  
25          every device in the whole world can only possess --



1 any -- any one IP address can only be possessed by one  
2 device at any given time. That's a little simplified,  
3 but -- and there are some exceptions and exclusions,  
4 ways that multiple devices can hide behind one address,  
5 but in a simplified manner, every device needs one IP  
6 address.

7 Q So how do you find an IP address?

8 A So IP addresses are not unique to a specific  
9 device. They generally come from the provider that is  
10 providing internet access to that device. So in the  
11 example of a cellular telephone, if you have a Verizon  
12 account, Verizon actually provides your cellular  
13 telephone with an IP address. And that IP address does  
14 not stay with your phone for any great length of time.

15 It stays with your phone for the short period of  
16 time that your phone needs to talk on the internet while  
17 you are actively browsing. When you stop actively  
18 browsing, that IP address will be returned to the  
19 Verizon system, and it will be assigned to another user  
20 by Verizon.

21 Q So is it -- is it possible to figure out what IP  
22 address was being used to access the internet at a  
23 particular point in time?

24 A Yes. So as -- there's been multiple exhibits  
25 admitted so far in this case that include responses from

1 internet service providers such as social media like  
2 Facebook and websites such as Backpage. And many of  
3 those exhibits have included IP address information,  
4 because this is the way that devices on the internet  
5 identify each other. And this is the way that service  
6 providers, like Facebook or Backpage, keep track of the  
7 devices that access their systems.

8 So in a typical investigation involving internet  
9 crime or any other investigation on the internet, the  
10 investigation usually begins at the end. So, for  
11 instance, if there is a question of who posted something  
12 to a particular place on the internet -- maybe a  
13 specific post to Facebook -- the investigation will  
14 usually begin at Facebook and say, well, there's an  
15 account name but that account name is not necessarily  
16 uniquely identifying of a human -- one particular human  
17 being, and so the question to Facebook, which is usually  
18 in the form of a court order, is what device connected  
19 to this account on a specific date at a specific time  
20 when that posting or that change or that update was  
21 made.

22 And then the response back from that service  
23 provider will typically be an IP address. That IP  
24 address then has to be traced to the owner, which is  
25 public record.

1 Q How do you do that?

2 A You can look it up on the internet. It's actually  
3 called a WHOIS search. So you would actually query a  
4 WHOIS database and say who is the IP address?

5 Q And what information would you get back from that  
6 query?

7 A You'd get back the owner. So like I mentioned,  
8 most individuals don't own an IP address. They're using  
9 one that their service provider -- their internet  
10 service provider is providing for them, so most likely  
11 what you would get back is Verizon Wireless, Charter  
12 Communications, Comcast Cable, et cetera, et cetera. So  
13 you get back the owner of the IP address.

14 Q And then what do you do?

15 A Then you send a court order to that owner. So, for  
16 instance, you send a subpoena to Verizon Wireless and  
17 you say on this date at this time when this certain  
18 event of interest happened, which one of your customers  
19 possessed this IP address? And then the response back  
20 will be all -- and then, of course, you ask for the  
21 subscriber information as well.

22 So what you would get back or what you expect to  
23 get back from a company like Verizon, or the others,  
24 would be specific customer information: a name, an  
25 address, bill information, potentially e-mail address,

1 potentially phone numbers, et cetera, of the specific  
2 customer who has the service that was used.

3 Q Earlier today Ms. Epp had testified about how -- I  
4 had asked her about how she didn't trace IP addresses in  
5 this case, and there was some discussion and testimony  
6 about how, given the fact that what they were  
7 investigating is prostitution and it was being conducted  
8 in hotels and people were transient, that using IP  
9 addresses is not very helpful. And could you provide an  
10 opinion about that based on your experience in  
11 investigations?

12 A Well, from Ms. Epp's testimony, that appeared to be  
13 an assumption, not a state of fact based on  
14 investigation. She is correct in so much that a place  
15 like a hotel that provides guest wireless access -- many  
16 hotels do not, but many.

17 Another good example might be a public library.  
18 Those places would become a data end of the  
19 investigation because it might show that the Hilton  
20 Hotel in Burlington, Vermont, is the -- was the user of  
21 that particular IP address on that stated date and time,  
22 and most public access, like hotels, restaurants, et  
23 cetera, have no mechanism of getting you any further, of  
24 being able to tell you which one of their customers was  
25 using that IP on that date and time.

1           The issue in this case in particular is that from  
2 all of the material I have reviewed, I didn't see any  
3 attempt to try to check those IP addresses, and some of  
4 the work that I did as part of this case was to at least  
5 WHOIS a sampling of the IP addresses that were found  
6 within some of the materials and the exhibits, and I  
7 actually found that the majority that I checked came  
8 back to cellular telephone companies, particularly  
9 Sprint and T-Mobile. And cellular telephone companies  
10 are usually pretty good about keeping track of who their  
11 customers are and so provide a mechanism -- pretty clear  
12 mechanism for tracking an IP address down to a specific  
13 customer who was using it on a specific date at a  
14 specific time.

15       Q     So we talked about the fact, and you are obviously  
16 aware of the fact, that Mr. Thornton examined the hard  
17 drive in this HP computer?

18       A     Yes, I am.

19       Q     And you are aware that the computer was powered on  
20 before he received it by Miss Epp?

21       A     Yes, I am.

22       Q     And what does his failure to indicate that computer  
23 was powered on indicate about his reporting and  
24 examination of the computer, in your opinion?

25       A     I would certainly have expected his reports to

1 identify the fact that the computer had been powered on  
2 prior to his examination. It is a key point in  
3 identifying the integrity of the data that was examined.

4 I was present for Mr. Thornton's testimony, and he  
5 testified that he knew it had been powered on but didn't  
6 find that relevant. I personally -- my opinion is I  
7 disagree with that. I think it's highly relevant and  
8 should have been documented and brought to the attention  
9 of the case agents and the prosecutor.

10 Q Mr. Thornton also submitted a number of reports  
11 based on his examination. In your opinion, do those  
12 reports meet industry accepted standards of digital  
13 forensic reports?

14 A No, they do not.

15 Q And why not?

16 A The reports Mr. Thornton have -- has as exhibits in  
17 this case are missing several components that are  
18 expected as an industry accepted standard. A forensic  
19 report should have a description of the case itself. It  
20 should have a description of the tasks that were  
21 assigned to the forensic examiner. For the reader of  
22 the report to be able to discern whether or not the  
23 forensic examiner found all the evidence he or she was  
24 supposed to be looking for, they have to know what they  
25 were looking for first.

1           On its face, Mr. Thornton's report doesn't explain  
2           what his assigned task was. So it's impossible to  
3           determine if his reports are complete or if his  
4           examination was complete.

5           There's also an expectation that the forensic  
6           examiner will create a conclusion of findings. What --  
7           so based on the tasks assigned, based on the actions  
8           taken, based on the evidence found, what's the  
9           conclusion? And Mr. Thornton's reports do not contain  
10          that.

11         Q     And you are aware that Mr. Thornton used a tool to  
12           examine the hard drive called the Forensic Explorer?

13         A     Yes, I am.

14         Q     What does using that tool -- does that have any  
15           implications for the results of his examination of a  
16           hard drive?

17         A     The Forensic Explorer tool is not considered a  
18           comprehensive forensic tool in this industry. It is  
19           forensically sound, and it is one -- most forensic  
20           examiners and most forensic laboratories have an entire  
21           suite of tools that they use at their disposal. Not  
22           every tool is good at every task. It's much like having  
23           tools in a literal physical tool box. One screwdriver  
24           won't fix everything. You need different sized  
25           screwdrivers, different sized wrenches, for example.

1 And forensics is the same.

2 Certainly that tool has uses. It is not generally  
3 considered to be highly comprehensive. There are  
4 components of forensic examination that -- that it is  
5 not capable of performing.

6 Q So what impact did using that tool have on this  
7 examination of the computer in this case?

8 A I think the biggest impact was that his examination  
9 appeared to be limited to essentially cursory searches  
10 of the hard drive rather than an in-depth analysis of  
11 the computer itself: the system, the data stored by the  
12 system, how the system operated, when certain events  
13 took place. It appeared as though his -- his analysis  
14 would -- was much more high level.

15 Q And one of the things that it appears that  
16 Mr. Thornton did is he used screenshots from the  
17 Forensic Explorer tool in order to create -- to document  
18 what he was looking at on the computer. Is that an  
19 appropriate way to document what you find on a computer?

20 A There are times where screenshots are used to  
21 document evidence. They are more the exclusion than  
22 rule. It is -- they're usually used in circumstances  
23 where the evidence cannot be forensically displayed in a  
24 humanly acceptable manner. There's a lot of data in a  
25 computer that is not meant for human consumption and



1 does not look like what we as humans need to understand  
2 the impact of that information.

3 So there are circumstances where the only and best  
4 way of documenting evidence is through a screen capture  
5 of a user interface where that data has been  
6 interpreted. But like I mentioned, that is more the  
7 exception than the rule. As a rule, we prefer to use  
8 the forensic tool reporting mechanisms that are built  
9 into the tools.

10 Part of the concern with screen captures is that  
11 they are digital pictures, and then as someone who has  
12 to sit here and testify about the integrity of evidence,  
13 you have to worry about answering the question, well,  
14 isn't it possible that picture was manipulated, edited,  
15 altered, even to the extent that if the picture is not  
16 the same -- if the screenshot is not the same resolution  
17 as the picture itself that might be being displayed,  
18 could that lend itself to a different interpretation of  
19 the evidence?

20 So our preference is to use the tools built into  
21 our forensic software to create reports. When we do  
22 that, those reports also come out with an extensive  
23 amount of information about the evidence that's being  
24 presented.

25 You know, in particular, during testimony earlier

1 today, Miss Epp couldn't testify to the time that a  
2 certain image was created on the computer because that  
3 exhibit lacked any headings above the dates and times.  
4 So there was no way for her to understand what the dates  
5 and times meant. That shouldn't happen, right? And  
6 using the tools in forensic software to create reports  
7 ensures that all of the information relevant to a  
8 particular file that's -- that's of evidentiary value is  
9 also reported on.

10 Q So Mr. Thornton identified a number of photographs  
11 that were found on the hard drive. Aside from  
12 identifying those photographs, though, is there any  
13 indication in any of his reports about how those  
14 pictures arrived on the computer?

15 A No, there is not.

16 Q And can you please explain to the jury what the  
17 various ways are that a picture could arrive on a  
18 computer?

19 A There's long list of reasons why a particular  
20 picture or any file, for that matter, is present on the  
21 computer.

22 The most obvious, of course, is that the picture is  
23 downloaded from a website, which is probably one of the  
24 more common ways that pictures end up on computers. It  
25 could also be transferred from external media such as a

1 thumb drive or an external hard drive or a CD or a DVD.  
2 The picture could also be there because it was  
3 transferred from a cloud location.

4 For instance, commonly Apple devices like  
5 iPhones -- many users of iPhones also use Apple's cloud  
6 service, which is called iCloud. One of the nice things  
7 about iCloud is it synchronizes the pictures you take  
8 with your phone to your computer for you so that they're  
9 on -- they're present on the computer. There's -- a  
10 phone or a digital camera could be connected directly to  
11 the computer and images could be transferred.

12 So there's really a long list of different ways  
13 that a picture could come to be saved on a computer.

14 Q And is one of those ways also being sent to the  
15 user of the computer within an attachment, through a  
16 message as an attachment?

17 A Sure.

18 A user could receive a picture as an attachment to  
19 an e-mail, as an attachment to an instant messenger  
20 makes, and then choose to -- to save it to the computer.

21 Q And what kinds of information can you learn about  
22 pictures that may be found on the hard drive?

23 A There's three main sources of information about a  
24 picture that's located on a hard drive. The first  
25 source is the picture itself. Beyond the content, that

1 visual -- visual content that we can see, many but not  
2 all digital images can contain what we call metadata,  
3 which is information stored inside the picture that is  
4 not part of the visual representation of the picture.

5 Metadata is placed into the picture by the device  
6 that takes the picture. Which portions of metadata are  
7 present in that picture is dependent on the device that  
8 takes that picture. With few exceptions, that metadata  
9 will not be changed within that picture, no matter --  
10 even if the picture is transmitted, if it's received, if  
11 it's copied and pasted, if it's resized, printed,  
12 metadata will largely remain the same with a few  
13 exceptions.

14 So that's the first place where we could find  
15 information about the picture. That metadata  
16 information typically will tell us the make and model of  
17 the device that took the picture, the date the picture  
18 was taken, and sometimes will tell us some information  
19 about the camera settings of the device, dependent on  
20 the device.

21 The second place where we find information about a  
22 picture that's saved on a computer is in the file system  
23 information. And this has been previously testified to  
24 as MAC times, MAC being an acronym for modified,  
25 accessed and created. The file system of the computer

1 tracks when a file is created, when a file is modified,  
2 and when a file is accessed, bearing in mind, though,  
3 that that is unique to the device that the file is  
4 sitting on. So when a particular computer marks a file  
5 as created on a certain date, that means it's saved to  
6 this device on that date. Doesn't mean it's the date  
7 the picture was taken. That comes on the metadata. So  
8 the date created means on this device.

9 File system data, the MAC times, are influenced by  
10 the movement of files, and they are influenced by the  
11 changing of files. If a picture were altered, resized,  
12 copied, pasted, printed, those settings can be changed.  
13 And those settings are readily visible to the user.

14 The third place that information about a picture on  
15 a computer can be found is from the computer itself.  
16 Whenever files are saved to a computer, sent from a  
17 computer to another location, copied, pasted, edited,  
18 altered, opened, viewed, played, there are certain  
19 artifacts created on that computer about that occurrence  
20 and about that activity. They're not there forever, and  
21 they are not -- not every single event that happens  
22 related to a file is recorded and kept in a manner that  
23 can be found later.

24 But to a great extent, to your question, one of the  
25 key places to find out information about a picture on a

1 computer would be from the computer itself to try to  
2 find artifacts that indicate how that picture got here,  
3 possibly where it came from, and potentially what's been  
4 done with it while it was here, how many times it was  
5 opened, saved, edited, et cetera.

6 THE COURT: All right. It is three o'clock.  
7 This is a good time for our break. So let's take a  
8 15-minute break and be back a little after quarter after  
9 three.

10 (Court was in recess at 3:04 p.m.)

11 (The following was held in open court with the jury  
12 present at 3:25 p.m.)

13 THE COURT: Okay. Miss Sen?

14 MS. SEN: Thank you, your Honor.

15 CONTINUED DIRECT EXAMINATION

16 BY MS. SEN:

17 Q So before our break, you were describing to the  
18 jury the kinds of information that you can learn from a  
19 picture once it's arrived on a computer, right?

20 A Yes.

21 Q So I wanted to show you some of the photos that  
22 came in as exhibits during Miss Epp's testimony  
23 yesterday. I am going to show you a -- the Exhibit 51B,  
24 which is photos of Katelynn C.

25 And actually, in order to assist you, I'm going to

1 hand you what's been marked as Defendant's Exhibit ZZ8.

2 Can you describe what that is, Mr. Martino?

3 A Yes.

4 Defendant's ZZ8 is printout of a spreadsheet that I  
5 created. The spreadsheet has one, two -- approximately  
6 nine rows. This was created as a summary of the file  
7 system export that I received from the government. The  
8 export we requested from the government was all of the  
9 file system information for all of the files on the HP  
10 computer, so inclusive of things like the file name, the  
11 path to the location on the hard drive where the file  
12 was stored, the date the file was modified, created,  
13 accessed, et cetera.

14 That spreadsheet, as expected, is quite lengthy.  
15 It's approximately 400,000 rows long, so it was  
16 impractical to print out and bring to court. So I took  
17 certain entries from that spreadsheet that were of  
18 relevance to my testimony and put them on a single  
19 spreadsheet that could be printed out in two pages.  
20 Those two pages are what are Defendant's ZZ8.

21 Q And just to be clear, this is just information --  
22 descriptive information about files that exist on the  
23 hard drive?

24 A That's correct. It's descriptive information from  
25 the file system. It is not the files themselves.

1 Q So I am going to show you what was marked as -- or  
2 admitted yesterday as Government's Exhibit 51B. And I  
3 am going to show you this photo on the -- on the lower  
4 right, which has the name SMH 012.

5 So this exhibit indicates that the photo was  
6 taken -- well, can you describe what information you  
7 have here about this photo.

8 A So the information provided in this exhibit  
9 relative to the photo SMH 012 includes the name of the  
10 file which is present in the left-most column; the date  
11 modified, which is expected to be the date modified from  
12 the MAC times of the computer; the type of file, which  
13 for this particular file is a JPEG image; the size of  
14 the file.

15 There's information titled "date acquired." I  
16 don't know what that information is based on the  
17 terminology used here.

18 Q Is that a term that is used within digital  
19 forensics to refer to anything that you are aware of?

20 A It would normally be a term used to describe the  
21 imaging process, when a device is acquired or imaged,  
22 but that isn't relevant to this exhibit, so I am not  
23 clear -- during Ms. Epp's testimony, she testified as to  
24 what she believed that date was, but it did not, to me,  
25 make sense.



1           And then last column all the way to the right is  
2           the date taken. This is presumed to be metadata from  
3           the image. JPEG images, as this one is, are capable of  
4           storing metadata, and so the expectation -- it's not  
5           possible to get the date taken from the file system, so  
6           the expectation is that that column contains information  
7           that was extracted from the metadata off this picture.

8           Q     And what does it show that the date taken was?

9           A     The date taken for this picture is 9/17/2013.

10          Q     Have you been able to learn from the file system  
11          data that you have referenced that's in front of you  
12          when that photo actually arrived on the computer?

13          A     Yes. This exhibit did not contain a create date,  
14          so it was not possible to determine from the exhibit.  
15          So using the file system export provided by the  
16          government, I was able to show that the picture SMH 012  
17          was saved to the computer or created on 7/22/14.

18          Q     And that's based on information from the hard drive  
19          itself that you were able to find?

20          A     That's correct.

21          Q     What's the significance of the fact that the photo  
22          was taken on September 17th of 2013, but wasn't created  
23          on the computer until July 22nd, 2014, almost a year  
24          later?

25          A     I think your question is, is the significance is

1 just the point in understanding the amount of time that  
2 elapsed between the time that the picture was actually  
3 taken and the time that it was saved to this computer.

4 Q I'm going to show you another exhibit that was  
5 admitted yesterday. So the bottom image -- this was a  
6 Backpage ad. It's Government's Exhibit 50D. And Ms.  
7 Epp, during her testimony, referenced the fact that the  
8 bottom photo here from this ad was found on the hard  
9 drive. Do you remember that?

10 A I do.

11 Q So now I am going to refer you to Government's  
12 Exhibit 50B, which are apparently photos from the hard  
13 drive. There's a photo there on the left. Is that  
14 similar to the photo in the Backpage ad that we just  
15 looked at?

16 A Yes. The photo here with the label "My Cars 3508"  
17 is visually similar to the photo from the Backpage ad.

18 Q So -- I'm sorry. I need to go back to the Backpage  
19 ad for a second.

20 Do you remember what date the Backpage ad was  
21 posted?

22 A It was January 2nd -- I'm going to need to  
23 reference it again.

24 Q Sure.

25 A I don't want to do it from memory.

1           So the posted date is actually present in the ad at  
2           the top. Posted January 2nd, 2016.

3           Q     So as we were discussing, Miss Epp had testified  
4           that they found the same photo in this hard drive, this  
5           photo My Cars 3508. Do you have any information when  
6           that photo was actually created in the hard drive?

7           A     Yes. The photo My Cars 3508 was saved to the  
8           computer and created on 2/1/2016.

9           Q     And what's the significance of that?

10          A     The significance is that the Backpage ad was  
11          created nearly a month prior to the presence of this  
12          image on the computer. So this computer logically would  
13          not have been part of or used in the creation of that  
14          Backpage ad.

15          Q     Now I am going to show you again the same Backpage  
16          ad, 50D, but it has a second page. I am going to ask  
17          you to look at the photo at the bottom. And Miss Epp  
18          had testified that this image also was found on the hard  
19          drive?

20          A     Yes.

21          Q     So I'm going to turn back to the extract of  
22          pictures from the hard drive. I'm going to ask you to  
23          look at the top right photo called "My Cars 3507." Is  
24          that similar to the same picture in the Backpage ad?

25          A     Yes, it is visually similar to the picture in the

1 Backpage ad.

2 Q And when was that photo created on the computer?

3 A That photo was created on the computer on 2/1/2016.

4 Q And we'd already talked about the fact that this  
5 was part of a Backpage ad that was actually posted on  
6 January 2nd of 2016.

7 A That's correct.

8 Q So it arrived on the computer a month later?

9 A Yes, it did.

10 Q So we'd also talked about earlier these two  
11 pictures that were found on the hard drive, image 3027  
12 and KK 137. Can you tell us anything about when  
13 these -- what -- so -- sorry.

14 Earlier today Miss Epp had testified that these are  
15 nearly identical photos, and she testified -- we talked  
16 about how the date taken for these photos differs.

17 A Yes, that's correct.

18 Q And she provided some testimony about how that's  
19 possible because, based on her training and experience,  
20 it's the last -- the photo was taken at least on the  
21 latest date, and it couldn't have been any earlier than  
22 that.

23 Based on your forensic analysis, what is the  
24 significance of having the same picture with two  
25 different dates for which it was taken?

1       A       I personally -- my opinion is I disagree with Miss  
2       Epp's testimony. The date taken is designed -- as part  
3       of metadata, it's designed to permanently reflect the  
4       date that that device took that picture. It does not  
5       change when the photo is altered, with the exclusion of  
6       if the photo was, for example, sent through a social  
7       media, many times social media providers will scrub the  
8       metadata out of it entirely, in which case it would be  
9       totally absent.

10           I agree with Miss Epp's visual look and belief that  
11       one of these pictures is brighter than the other; and  
12       why, I don't know. Forensically we can't tell you why.  
13       But that -- for instance, if someone were to have  
14       altered this photo in order to brighten it, or change  
15       the contrast or any other editing that would affect the  
16       photo, the visual parts of the photo, the date taken,  
17       would not be changed because that picture has not been  
18       taken again.

19           The date -- metadata is inserted by the device that  
20       takes the picture. Changing the contrast, the  
21       brightness, et cetera, is not taking the picture.

22           My concern with this picture is that the two  
23       pictures are obviously identical. I don't believe that  
24       it would be possible to bring a human being to a  
25       location and pose them in such a perfectly identical

1 manner with the same background, even with the same hair  
2 in the same spots, on two different dates that are  
3 months apart from each other; it seems impossible. So  
4 from a forensic standpoint, I question the -- the data.  
5 I question that the data is accurate and correct and  
6 don't -- this tells me I can't rely on that information.  
7 Something has corrupted that information.

8 Q Because the date taken of the image would never  
9 change given the way you described metadata; isn't that  
10 correct?

11 A Unless it's intentionally changed. The date taken  
12 does not change. Metadata -- the whole reason metadata  
13 exists is to prevent what Miss Epp testified to from  
14 happening. The idea was -- of creating metadata was  
15 that this information about the photo would travel with  
16 it, in theory, forever. So you would always be able to  
17 know the date it was actually taken. You would always  
18 be able to know the camera that took it and possibly  
19 even the settings of the camera for certain devices.  
20 The whole tenet of metadata is that it's static.

21 Q And we also looked at earlier today with Miss Epp  
22 this ad, 48D, which is a Backpage ad. So when was this  
23 ad created?

24 A Well, there's -- there's two dates here related to  
25 this ad. So the ad itself is in the top portion of this

1 exhibit, above that. That is the advertisement itself.  
2 Below that is what's called administrative data.

3 So the administrative data is neither created  
4 nor -- most of it is -- nor is it viewable to the user.  
5 This was what was kept by Backpage. So this  
6 administrative data at the bottom was provided when the  
7 government either subpoenaed or sent a search warrant to  
8 Facebook. So the ad itself states that the ad was  
9 posted October 22nd, 2015. However, the  
10 administration -- administrative data states that the ad  
11 was created on June 10th, 2015.

12 Q And then there's also some other data on the  
13 right-hand side that -- the "user created" and the  
14 "e-mail verified"?

15 A Yes. Well, that's unique to the user. So  
16 certainly a user -- the expectation, of course, and it  
17 makes sense, the user was created before the ad was  
18 created, before the ad was posted. The e-mail gets  
19 verified later than all of this, which basically just  
20 means that Backpage didn't send a verification to  
21 whatever e-mail was on record for this account at the  
22 time this was created. Backpage didn't send one of  
23 those, you know, "click here in the e-mail so we know  
24 you're really you." So that didn't happen until the  
25 following year in 2016.

1 Q So what does it mean that the ad was created on  
2 Wednesday, June 10th, and it was posted on October 22nd?

3 A It -- we don't know for certain because there's not  
4 enough information here, but the likely cause is that  
5 either the ad was created in draft and not posted to the  
6 internet until many months later, or the ad was edited  
7 over time and reposted, essentially. So the content was  
8 changed over time, and what we're looking at at the top  
9 may be the final iteration of it rather than what it was  
10 when it began. But there is not enough information to  
11 know for certain which of those scenarios is true.

12 Q I'm going to show you, after I clear this, what the  
13 second page of this ad -- where there's some photos that  
14 we also discussed earlier today.

15 And there are three images present. Did you look  
16 for the third image on the hard drive?

17 A I did.

18 Q What did you find?

19 A I found the third image, the one all the way to the  
20 right, is present on the HP hard drive.

21 Q And did you -- were you able to find out when that  
22 photo was actually created on the computer?

23 A Yes, I was.

24 Q And what did you learn?

25 A That image was created on the computer on



1 3/10/2016.

2 Q So that's almost six months after the ad was  
3 posted?

4 A That is correct.

5 Q So Mr. Thornton talked about a number of websites  
6 that he had accessed -- that he had identified were  
7 accessed through the computer, and he had developed this  
8 Exhibit 75 that was admitted yesterday. And you were  
9 here in the courtroom when Mr. Thornton was testifying.  
10 Is there some information missing from this exhibit?

11 A There is.

12 So Mr. Thornton testified, and the title of the  
13 exhibit correctly indicates, that this exhibit is the  
14 history from the Google Chrome internet browser from the  
15 HP computer, and Mr. Thornton testified the title does  
16 indicate that it is, as it states, "select sites."

17 My concern with this exhibit is it doesn't give a  
18 full picture of the internet browsing history that was  
19 occurring on the computer.

20 Q Did you have an opportunity to do some  
21 investigation into that?

22 A Yes. So as part of my investigation, we requested  
23 the complete output, complete export of all of the  
24 internet history from the computer, keeping in mind that  
25 computers don't keep internet history forever. It's

1       kept for a finite period of time. That amount of time  
2       is set -- can be altered by the user. Also keeping in  
3       mind that the internet history file is not the sole  
4       location on a computer where evidence or artifacts of  
5       internet activity can be found.

6               However, we did request and were given by the  
7       government a complete export of the internet history for  
8       the computer.

9       Q     And what did you find?

10      A     So some of the findings are very similar to  
11      Mr. Thornton's findings. Mr. Thornton did find and  
12      correctly identify that there are visits to the  
13      backpage.com website, and some of those are visible  
14      here. There's -- there's actually numerous in this  
15      exhibit.

16              Looking at the complete Chrome history actually  
17      shows quite a few more visits to the backpage.com  
18      website. What's interesting in the rest of the history  
19      is the nature of the visits.

20              Mr. Thornton testified yesterday that to an extent,  
21      just from this limited amount of information, you can  
22      get an idea of where in a certain website a user is and  
23      what content they're viewing. So the URL in the center  
24      column shows us the actual website address, and the  
25      title shows us, you know, presumably the title of the

1 material being viewed.

2 So one of the things found when you look at the  
3 entirely available internet history is that a large  
4 number of visits to the backpage.com website are to the  
5 downloads page. You would see a URL very similar, for  
6 instance, for instance, to this one except instead of  
7 "/payment" you see "/download" and then a file name.  
8 And there were a very large quantity of those.

9 Q And based on your examination, what can you infer  
10 from that?

11 A The inference is that the user of the computer is  
12 downloading individual pictures from the backpage.com  
13 website to the hard drive of the computer.

14 Q And would you be able to identify if there are  
15 photos that are uploaded to Backpage?

16 A There are artifacts that can be present on the  
17 computer when files are uploaded to -- to a particular  
18 website. Yes.

19 Q And were you able to find any of those? Or did you  
20 have the tools to find those on this -- when you did  
21 this examination?

22 A No. The examination that I performed was limited  
23 both in scope, time and also by the tools that were  
24 available. It was really what we would call a forensic  
25 preview, not a forensic examination. But in the limited

1 amount of data that we were given from the government,  
2 or able to access on our own, I did not see any  
3 indication of uploads to the backpage.com website.

4 MS. SEN: Your Honor, may I have just a  
5 moment, please?

6 THE COURT: Yes.

7 (Brief pause.)

8 MS. SEN: Your Honor, we don't have anything  
9 further at this time.

10 THE COURT: Okay. Any cross examination?

11 MR. GRADY: Yes, your Honor.

12 CROSS EXAMINATION

13 BY MR. GRADY:

14 Q Mr. Martino, you covered lots of -- give me a  
15 minute to get organized.

16 A Yes, sir.

17 MR. GRADY: And if we could switch from the  
18 ELMO, Joanne, to the government counsel. Thank you.

19 BY MR. GRADY:

20 Q Mr. Martino, I first want to show you 47B. Now,  
21 you talked earlier in your testimony today about the  
22 impact that powering on the computer had on February  
23 2nd, 2017. Right?

24 A Yes.

25 Q Now, would you agree that powering on the computer

1 did not have an impact on photos shown in 47B?

2 A Yes. The analysis that I did showed that these did  
3 not appear to be affected.

4 Q If they were affected, the date modified, the date  
5 created, the date accessed would be 2/2/17 or later?

6 A Yes.

7 Q And we can be certain that the photo was taken on  
8 May 17th, 2013?

9 A To the extent that we trust the data in the  
10 exhibit.

11 Q Yes, sir. And let's go to the next page.

12 Same thing as it relates to the file name Han5;  
13 there's no indication that powering on the computer  
14 impacted the data that's contained in 47B-002?

15 A That's correct.

16 Q And by the way, who -- does the user have to rename  
17 the file Han5 or My Cars 2415 or My Cars 2416?

18 A Most likely. Or it was named that. It went up to  
19 the location it came from, and when it got copied,  
20 downloaded, et cetera, it came with that name, one or  
21 the other. That is not typical nomenclature for a  
22 camera or a phone.

23 Q Sure.

24 Would you agree, Mr. Martino, that the files that  
25 were created on February 2nd, 2017, are system operating

1 files?

2 A They are predominately system files, but not  
3 exclusively.

4 Q But consistent with what you would expect to see  
5 when one powers on a computer?

6 A It's consistent with both powering on and a level  
7 of user activity.

8 Q You're not disagreeing -- well, let me ask it this  
9 way: There's no indication that the government inserted  
10 any files such as the files in 47B onto the hard drive?

11 A No, there is not.

12 Q Because if that was the case, you would see a  
13 create date of 2/2/17 or later?

14 A It depends if the person doing it knew what they  
15 were doing or not. There are certainly mechanisms to do  
16 so without causing that to happen, but there's -- there  
17 was no evidence in what I could see that that occurred.

18 Q Now, I want to talk a little bit about the websites  
19 that you -- we talked about in Exhibit 75. And I  
20 believe your testimony is that the information that you  
21 saw was consistent with someone searching on Backpage.  
22 Correct?

23 A It was actually that I saw multiple indications of  
24 someone downloading files from Backpage.

25 Q And to download, you have to go to Backpage to view

1 different ads in order to download files or download  
2 pictures?

3 A Presumably.

4 Q So you don't know if that person was perhaps  
5 checking on someone's ad to see if they were -- what  
6 they were doing?

7 A No. This data does not allow me to know what the  
8 person's intention was.

9 Q And to be clear, the data was -- the data that was  
10 on 79 -- which is the hard drive --

11 A Correct.

12 Q -- in that computer tower?

13 A Yes.

14 Q So if, for example, the user was at a hotel and  
15 they wanted to post from the computer tower, they'd also  
16 have to bring presumably a keyboard?

17 A Yes.

18 Q A mouse?

19 A Yes.

20 Q A monitor?

21 A Yes.

22 Q Quite a bit to lug around in a hotel to connect,  
23 would you agree?

24 A I would.

25 Q So if the user is using a cell phone or an iPad,

1       that's not going to show up from the data that was in  
2       79?

3       A     No, it is not.

4       Q     Mr. Martino, I take it you are not an employee of  
5       backpage.com?

6       A     No, sir, I am not.

7       Q     You don't know quite exactly what their policies  
8       are as far as retaining information from users or  
9       records?

10      A     No, I do not.

11      Q     You don't know why they might keep deleted photos  
12      as part of advertisements?

13      A     No, I do not.

14      Q     There was some mention about IP addresses earlier  
15      in your testimony, I believe. Am I correct?

16      A     Yes, you are.

17      Q     And I believe you agreed with the proposition that  
18      if an IP address is owned by the hotel, the hotel isn't  
19      going to be able to go further and say that IP address  
20      was used in Room 102 to Mr. Martino; is that correct?

21      A     That is correct.

22      Q     And the IP address is not going to tell you if  
23      force was used?

24      A     No.

25      Q     An IP address is not going to tell you if fraud was



1       used?

2       A       No.

3       Q       It's not going to tell you coercion was used?

4       A       No.

5       Q       I want to return to -- or I am going to show you  
6       50 -- 50D. We talked a little bit about the photos in  
7       this Backpage advertisement, and I want to go to 50B.

8               MR. GRADY: And if we could go to the next  
9       page. Okay, this page is fine. If we can go ahead and  
10      split the screen. And on the right side I would like to  
11      pull up Government Exhibit 74, Bates 12163.

12      BY MR. GRADY:

13      Q       Now, on 74, am I correct, Mr. Martino, that  
14      according to the metadata associated with this photo,  
15      that a Samsung SM-G920A was used to take this photo  
16      presumably January 2nd, 5:26 p.m.

17      A       74 is the image to my right, correct?

18      Q       That is correct. Hopefully you can see the  
19      highlights that I --

20      A       Yes, I can. I just wanted to verify.

21               Yes. The metadata that's present in the exhibit  
22      does indicate that.

23      Q       And to your knowledge there was a Samsung SM-G920A  
24      involved as part of this case, correct?

25      A       That is correct.

1 Q In fact, I am holding up Exhibit 77. Would you  
2 agree this is a Samsung SM-G920A? If you want to look  
3 at it --

4 A From a distance, I would say probably.

5 Q Yeah. You can go ahead and move that around and  
6 confirm whether that's a Samsung SM-G920A.

7 A Yes, I would agree.

8 Q Okay. So would you agree, Mr. Martino, that -- and  
9 I know we can't say for sure, that perhaps this camera  
10 took this picture on January 2nd, 2016? It's possible.

11 A It's possible.

12 Q Okay. Assuming that that is possible, would you  
13 say then that -- from what it appears in 50B-002, that  
14 if this picture was taken on here, it was not perhaps  
15 saved to the hard drive until February 1st, 2016?

16 A I don't believe the created date is present on --

17 Q Sure. Well, I think -- I think it's in  
18 Exhibit ZZ8, is the defense -- the spreadsheet that you  
19 created?

20 A You're referring to the picture bottom left of this  
21 exhibit, labeled "My Cars 3504"?

22 Q Yes. The question is, is looking -- we can scroll  
23 through 50B a little bit further. There's some --

24 So would you -- would you agree that it appears  
25 that the picture -- and let's just use My Cars 3508 as

1 an example. And actually it's listed in your  
2 spreadsheet in ZZ8. It appears that My Cars 3508 is  
3 similar to what is shown in 74, Bates 12163? And that  
4 appears to be the same room, the same bedspread, TV  
5 behind it? The setting seems similar? Would you agree?

6 A Partially, yes.

7 Q Well, there's a brown door to the top right? I  
8 mean, I know the lighting's a little bit different,  
9 but --

10 A Yeah, there are visual similarities. Yes.

11 Q Visual similarities?

12 A Sure.

13 Q According to ZZ8, you say that My Cars 3508 was  
14 created on February 1st, 2016. Do you want to look at  
15 it again?

16 A No. I have it right here. That is correct.

17 Q Okay. Again, going back to the hypothetical:  
18 Assuming this Samsung took the picture that is shown, is  
19 it possible that the picture could have gone from this  
20 phone to the hard drive on February 1st, 2016?

21 A Well, no. You have connected three disparate dots.  
22 So there is evidence to my right, to the exhibit to my  
23 right, that could have potentially been taken with a  
24 phone of the same make and model.

25 Q Sure.

1 A However, 3508, we don't -- we are not looking at  
2 metadata to support what took that picture.

3 Q Sure. Well, let's assume for the moment that  
4 there's a series of pictures taken of this person on  
5 February 2nd, 2016, by this phone. With me so far?

6 A Yes, yes.

7 Q Okay. Let's say the cluster of those pictures were  
8 then saved onto the hard drive in 79 all on February  
9 1st, 2016. Is that possible?

10 A Hypothetically, sure.

11 Q Well, if it was created on the hard drive, 3508 was  
12 created on the hard drive on February 1st, 2016, right?

13 A Yes.

14 Q And that tells you that it was transferred onto the  
15 hard drive February 1st, 2016?

16 A Yes.

17 Q It's not a hypothetical. If -- if --  
18 hypothetically speaking, if this 74 is one and the same,  
19 perhaps it could have gotten there on February 1st,  
20 2016, at the same time?

21 A Okay, you just said it's not a hypothetical, but  
22 hypothetically speaking.

23 Q Well, we can just disregard it. I don't think we  
24 need to go around in circles anymore about this but  
25 other than it's possible that the picture taken by this

1 phone was saved onto the computer on February 1st?

2 A That is possible.

3 Q Now, I want to go back for a minute. You talked  
4 about image --

5 MR. GRADY: And if we could go to 50D-004.

6 I'm sorry, 50B-004.

7 BY MR. GRADY:

8 Q Okay, we talked a little bit about the images IMG  
9 3027 versus KK 137. Are you aware if KK 137 has been  
10 tagged in any fashion?

11 A No. I only have the information that's present and  
12 the information that I was provided from the hard drive.

13 Q Okay. Is it possible for a user to photoshop  
14 images?

15 A Yes, it is.

16 Q Could that impact metadata?

17 A It should not.

18 Q But it is possible for the user to make changes and  
19 manipulate photos and data?

20 A Yes.

21 Q And to be fair, Mr. Martino, there are other  
22 devices in this case, such as, oh, a tablet, a mini  
23 tablet, that have not been accessed, correct?

24 A That is correct.

25 MR. GRADY: We can go ahead and put 50B down.

1 BY MR. GRADY:

2 Q And, in fact, sometimes metadata doesn't always  
3 exist for a certain picture or an image?

4 A Yes, that is true.

5 Q Mr. Martino, I assume you are not doing this for  
6 free?

7 A No, sir, I am not.

8 Q You are being paid?

9 A I am.

10 Q What is your hourly rate?

11 A \$150 an hour.

12 Q Do you get paid more for trial testimony as opposed  
13 to consultation?

14 A Actually, yes. Trial.

15 Q What's your trial testimony?

16 A Trial I believe is 225.

17 Q And been here all week?

18 A This is day three.

19 Q Finally, Mr. Martino, I want to talk to you a  
20 little bit about Michael J. Piznarski. Do you remember  
21 that name?

22 A I do not.

23 Q Is it a case you worked on?

24 A Not that I recall, but it's possible. I have  
25 worked on a lot of cases.

1 Q Possible you were the digital examiner in that  
2 case?

3 A Possible. I'm not recalling that name.

4 Q Do you recall someone who recorded sex acts with --  
5 without a person's consent or their knowledge?

6 A I have done several cases like that, but I do  
7 recall cases --

8 Q Sure.

9 A -- of that nature.

10 Q This one happened about six years ago.

11 A Again, I'm in the police department at that time.  
12 I'm working dozens of cases simultaneously.

13 Q Do you recall searching the defendant's laptop and  
14 finding videos that he recorded of sexual encounters  
15 with the victim without her knowledge?

16 A I don't recall this name, so I really am not  
17 comfortable saying anything.

18 Q Do you recall being in the grand jury when the  
19 victim testified?

20 MS. SEN: Objection, your Honor.

21 THE COURT: Well --

22 MS. SEN: I think this is getting a little far  
23 afield.

24 THE COURT: Yeah. Can you give him some clue  
25 to identify the case in which he worked, if he worked on

1       this.

2                       MR. GRADY:    Sure.

3       BY MR. GRADY:

4       Q     Do you remember there being an appellate decision  
5       about irregularities in the Michael Piznarski case?

6       A     I don't remember Mike -- the name Michael  
7       Piznarski, so I can't talk about the case.

8       Q     Is it a rule that you should not be present in a  
9       grand jury when someone else is testifying?

10      A     Yes.

11      Q     Do you remember violating that rule?

12      A     No.

13      Q     You don't recall an appellate opinion, People  
14      versus Piznarski, New York opinion, where it said that  
15      Examiner Anthony Martino should not have been present in  
16      the grand jury room when the victim was testifying?

17      A     No.

18      Q     So are you saying that did not happen at all?

19      A     No, I am saying I don't know anything about -- I --  
20      I don't get involved in appellate court decisions.  I'm  
21      a forensic examiner.

22      Q     Sure.

23      A     I have been present in courtrooms and even grand  
24      jury testimony, you know, in order to provide technical  
25      expertise on many cases.



1 Q You don't recall if that's ever been an issue?

2 A No.

3 Q You don't recall an appellate court criticizing you  
4 for being present in a grand jury when a person is  
5 testifying?

6 A I --

7 MS. SEN: Objection, your Honor. This  
8 testimony here has nothing to do with being the  
9 examiner --

10 THE COURT: Yes.

11 MS. SEN: I don't think that --

12 THE COURT: Objection overruled. You can  
13 answer it, and then I think that should be the final  
14 answer, and you can move on to the next topic.

15 MR. GRADY: Okay, your Honor. No further  
16 questions.

17 THE COURT: Oh, okay.

18 All right. Ms. Sen, do you have any further  
19 questions?

20 MS. SEN: No, your Honor.

21 THE COURT: Okay. Thank you, Mr. Martino.

22 THE WITNESS: Thank you, your Honor.

23 (Witness excused.)

24 THE COURT: All right, defense call the next  
25 witness?

1 MR. KAPLAN: Judge, may we approach?

2 THE COURT: Yes.

3 (The following was held at the bench.)

4 MR. KAPLAN: What do you want to talk about,  
5 Judge?

6 THE COURT: Want to talk about whether you are  
7 going to call your client?

8 MR. KAPLAN: Well, can we talk about that in  
9 the morning? It's been a long day.

10 THE COURT: Huh?

11 MR. KAPLAN: It's been a long day. Your law  
12 clerk's tired.

13 THE COURT: I see. Well, tell me what -- you  
14 have to talk to him?

15 MR. KAPLAN: I do have to spend some time with  
16 him. We had an issue come up with the Tatro matter that  
17 needs to be resolved before we can go any further, so --  
18 not -- just between him and me, not between anybody  
19 else.

20 It's only -- if he were to testify, you'd have to  
21 ask the jury to leave anyway so he could get on the  
22 stand because he doesn't want to be --

23 THE COURT: No, I appreciate that. But it  
24 is -- you know, this is -- this is a little unfair to  
25 the government because on the one hand, I understand

1       that you don't have to tell them whether you are going  
2       to call your client in general, but now we are going to  
3       the eve of the summations. But are you telling me --  
4       you telling me you don't know the answer as to whether  
5       he is going to testify?

6               MR. KAPLAN: No, no, I am not saying that.

7               THE COURT: Oh. Okay. What are you saying?

8               MR. KAPLAN: I'm saying that I thought it  
9       would be a good time to break. It's only like 20  
10      minutes early.

11              THE COURT: Okay. All right?

12              MR. DARROW: So would it -- I infer from what  
13      Mr. Kaplan just said that he has decided whether or not  
14      he is going to call his client. I think the government  
15      should be informed. It's the day before closing  
16      arguments and summations. We have been waiting day  
17      after day.

18              THE COURT: You know, in general, I really  
19      appreciate that you don't have to tell the government as  
20      to whether --

21              MR. KAPLAN: I don't mind saying that as it  
22      looks right now, I am going to call him. I could come  
23      in in the morning and not do it, I suppose. I have  
24      gotta spend some time with him, but I have always told  
25      Mr. Darrow, "You should be ready to cross him," you

1 know.

2 THE COURT: Okay. So what you are saying  
3 right now, to the best of your ability, you think --

4 MR. KAPLAN: I would like to call him.

5 THE COURT: That he's going to testify?

6 MR. KAPLAN: Right.

7 THE COURT: Okay. All right? I guess we'll  
8 call it a day, and I'll speak with you a little bit  
9 more. Okay.

10 MR. DARROW: Thanks.

11 THE COURT: But you are on notice that he  
12 is -- okay. Thanks.

13 (The following was held in open court.)

14 THE COURT: All right. It's -- before the  
15 next witness, we should call it a day. So I am going to  
16 let you go at 10 after. We'll begin at nine o'clock.  
17 In general, it may very well be that you will get the  
18 case tomorrow or maybe not. It's unclear at this point.  
19 So if it's possible and you do get the case, then you  
20 will have the ability to impact the schedule, so if we  
21 go past 4:30, you can call that. So if any way you can  
22 make alternative arrangements for your personal  
23 responsibilities so that you would be free after 4:30,  
24 that would be helpful, but I am not suggesting one way  
25 or another as to whether you will get the case tomorrow

1 or not. You may, or it may be the following day.

2 All right. And again, I want to remind you not to  
3 say anything about this case to anyone, and we will see  
4 you tomorrow morning. And I am going to stay and talk  
5 with the lawyers.

6 (The jury was excused after which the following was held  
7 in open court at 4:13 p.m.)

8 THE COURT: All right. If the defense calls  
9 additional witnesses, then we will continue with  
10 additional witnesses. If the defense does not call  
11 witnesses but rests, will there be rebuttal evidence  
12 from the government?

13 Frankly, I only ask because if there is no rebuttal  
14 evidence and no one testifies from the defense, we're  
15 heading for summation.

16 MR. DARROW: If the defense closes in the  
17 morning, we are not calling anyone following.

18 THE COURT: All right. So you should be  
19 prepared for summations. Okay.

20 MR. DARROW: Yes, your Honor.

21 THE COURT: That's the first thing.

22 The second thing is, again, on Count 15, we have  
23 begun the research. It's -- and we'll continue on.  
24 There are, in fact, Fifth Circuit case -- actually,  
25 what's sort of helpful is the research into the

1 congressional background into the change in 2015.

2       Apparently Congress was concerned not with  
3 situations like this in which young people are called to  
4 have photographs taken and Backpage used.

5       Apparently the motivation for the change was to  
6 address all the money that was being made by Backpage.  
7 In fact, Backpage sued Congress for violation of the  
8 First Amendment, and lost essentially. So the focus is  
9 less about protecting young women, or girls; it's more  
10 about making sure that companies were not profiting  
11 large amounts in advertising. So as a result, if one is  
12 aiding and abetting by getting women to have pictures  
13 taken and then posted on Backpage, then they could be  
14 prosecuted for that.

15       There are a number of cases before that. In fact,  
16 there's obviously a Second Circuit case, which is not a  
17 reported case; there's also an Eleventh Circuit case,  
18 not reported case; a four -- Fifth Circuit case as well,  
19 all of which suggests that in situations like this when  
20 minors are used for photographs to post on something  
21 like Backpage, that that actually can be conceived of as  
22 aiding and abetting. It's under an aiding and abetting  
23 theory, but also, I think, slightly confirms the  
24 government's position that the law in 2015 was not  
25 significantly changed in regard to advertising when you

1 are talking about young persons participating in  
2 advertising and that being related to aiding and  
3 abetting a commercial act, or maybe even the  
4 photographing and posting being a commercial act.

5 So my question initially was this: You know, what  
6 is -- in particular, Hannah -- is actually posting  
7 photos that were of her with these other persons a  
8 commercial act? Or was it not? If the commercial act  
9 is just the actual act of prostitution, well, there's  
10 very little evidence that she participated in  
11 prostitution.

12 If the commercial act is actually posting her  
13 image, then it's a stronger argument to say that she  
14 participated in a commercial act as a result of enticing  
15 or force or coercion from others. I mean, that was  
16 essentially the debate in my mind.

17 You know, it seems that there are cases out there  
18 prior to 2015 which address this issue, and they add  
19 this element of aiding and abetting. So then I went  
20 back to the indictment, and indeed aiding and abetting  
21 is included within Count 15. So the question is whether  
22 aiding and abetting others in prostitution would satisfy  
23 the statute. Anyway. And I'm telling you this because  
24 I'd like a memorandum on either these cases or this  
25 issue in general, and you should know what we found.

1           So I'd ask that -- you know, that both of you --  
2       both sides submit briefing as to whether the status of  
3       the evidence that she had these images taken from  
4       photographs and posted on Backpage -- and there's very  
5       little evidence to suggest that she was engaged in  
6       prostitution, is that sufficient to meet the statute?

7           Any questions at all?

8           MR. DARROW: Perhaps if the parties had the  
9       citations to those cases, your Honor, it would move us  
10      along in the analysis.

11          THE COURT: Yes. I would be glad to get the  
12      citations from the person who has the citations. I just  
13      have the summaries. Okay.

14          All right. Anything from the defense?

15          MS. SEN: No, your Honor. I will brief it for  
16      you.

17          THE COURT: All right. Okay.

18          All right. So the decision is made whether we have  
19      more testimony or not tomorrow. If not, we go into  
20      summations.

21          Now, when would you like a copy of the charge? I  
22      can get that prepared in half an hour. Would you like a  
23      copy? There have been some minor changes, and I'm  
24      reviewing now the three requests that you have made.

25          MR. KAPLAN: You want us to review it with the



1 Court today or just e-mail it to us and we will get it  
2 in the morning?

3 THE COURT: We will e-mail it to you. I mean,  
4 you have already reviewed it and said there are no  
5 objections, but there are a couple of changes, frankly.  
6 For instance, immunized witnesses; were there any  
7 immunized witnesses? I didn't remember any.

8 MS. SAVNER: Well, Keisha Willard did have  
9 letter immunity, but that was not, I believe, raised.

10 THE COURT: It was never mentioned.

11 MS. SAVNER: No.

12 THE COURT: So the question is whether you  
13 want an instruction on immunized witnesses, and I  
14 just --

15 MS. SAVNER: We don't think it's necessary  
16 given that it wasn't a fact at issue.

17 THE COURT: Okay. All right.

18 MS. SAVNER: And another question, your Honor:  
19 In terms of a copy of the indictment, I don't know what  
20 your practice is.

21 THE COURT: Yes. So -- maybe Judge Crawford  
22 does this. Ordinarily I don't do that, and the reason I  
23 don't do it is because there's a lot of, some would say,  
24 extraneous material in a Count 1 conspiracy indictment.  
25 And so generally the charge has -- the charge includes

1 the charges, and I take actually the first two  
2 paragraphs of the conspiracy count, and then the other  
3 counts, they're grouped into sections. 3, 5, 7, 8 and 9  
4 I think are all grouped in one particular -- and we go  
5 through all of those. And actually they're read in the  
6 charge. So I don't actually submit the indictment  
7 itself -- anyway -- in case there's any objection. And  
8 10 through 15, I go through each one of those charges in  
9 the charge and read actually the charge and then define  
10 it. And the same with 16.

11 MS. SAVNER: So obviously as charged, and I  
12 don't remember how it stands in the last version of the  
13 jury charge, but we charged Victim A, Victim B --

14 THE COURT: Oh, no, that's all been modified  
15 to the names, the first name and the second initial --  
16 or first initial.

17 MS. SAVNER: Thank you.

18 THE COURT: I can get this to you fairly  
19 quickly, and you can take a look at it and we can talk  
20 about it tomorrow. All right?

21 Is there anything else at this point?

22 MS. SAVNER: Not from the government.

23 MR. KAPLAN: No, your Honor. Thank you.

24 THE COURT: All right. Okay. We'll see you  
25 tomorrow.

1 And we will e-mail you the charge. How about that?

2 MS. SAVNER: Your Honor, one more question.

3 THE COURT: Yes.

4 MS. SAVNER: Would you like the briefing  
5 e-mailed as well or just filed?

6 THE COURT: If you get it done tonight, I  
7 would love to have the -- have it e-mailed, but if not,  
8 I will just read -- I will get here tomorrow early and  
9 read it.

10 MS. SAVNER: Okay.

11 THE COURT: Okay. Thank you.

12 (Court was in recess at 4:24 p.m.)

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16 C E R T I F I C A T I O N

17 I certify that the foregoing is a correct  
18 transcript from the record of proceedings in the  
above-entitled matter.

19



20 May 7, 2019  
21 Date

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Anne Nichols Pierce

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